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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CARLOS MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of the State of Illinois, First Judicial District

PETITION FOR WRIT OF CERTIORARI

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96 PP

QUESTIONS PRESENTED
[Rule 14.1(a)]

1. Does the Illinois reviewing court decision conflict with a decision of this Court, by misapplying to the facts of the instant case, constitutional principles of 14th Amendment due process and 6th Amendment right to confrontation as enunciated in Cruz v. New York, 481 U.S. 186, where the Illinois reviewing court held that petitioner's constitutional rights to due process of law as per the 14th Amendment and his 6th Amendment right of confrontation, were not violated, and that he was not deprived of a fair trial, by the use against him, at their joint jury trial, of the "interlocking" confessions of (i) a non-testifying codefendant and (ii) two codefendants who testified but were not properly

cross-examined--where all three codefendants' confessions implicated petitioner, even though the jury was instructed to consider each confession only against the person making it, and petitioner also made incriminating statements--since **at trial petitioner testified, repudiating his confession**, which scenario is expressly recognized in Cruz as most prejudicial to a defendant's aforesaid constitutional rights; and moreover, the prosecutor expressly argued to the jury (despite the court's instruction to the contrary, as aforesaid) that the various statements could be considered interchangeably amongst and against all the defendants?

2. Does the Illinois reviewing court's determination that denial of petitioner's motion to suppress his incriminatory statements was correct, conflict with controlling constitutional principles respecting burden of proof of voluntariness of confessions as expressed in such decisions of this Court as Lego v. Twomey, 404 U.S. 477, and respecting involuntariness of a confession obtained while a defendant is in pain and denied medication, as per Mincey v. Arizona, 437 U.S. 385, where petitioner moved to suppress his confession on grounds it was involuntary and coerced, and his testimonial claims (both at pre-trial hearing on motion to suppress, and at trial) of involuntariness due to incapacitation stemming from his epilepsy--more precisely, from

police withholding medication necessary for treatment of his epilepsy --including petitioner's testimony, corroborated by one of the co-defendants, that petitioner suffered several seizures during interrogation, and petitioner's further testimony that he requested his medication, which requests were denied (not even aspirin was provided, though promised), were unrebutted?

3. Did the Illinois court erroneously hold that joint representation of petitioner and codefendant Wiley by single counsel did not result in an actual conflict of interest that deprived petitioner of effective assistance of counsel and a fair trial, in violation of his constitutional rights under the 6th and 14th Amendments?

PARTIES INVOLVED [Rule 14.1(b)]

Petitioner, Carlos Moore, was the defendant in the Circuit Court of Cook County, Illinois, the appellant in the Appellate Court of Illinois, and the petitioner in the Illinois Supreme Court.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, the appellee in the Appellate Court, and the respondent in the Illinois Supreme Court.

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No. _____

CARLOS MOORE,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of the State of Illinois, First Judicial District

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, Carlos Moore, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First Judicial District, Fifth Division, affirming the

judgment (convictions and sentence) of the Circuit Court of Cook County, Illinois, Criminal Division.

Petitioner was convicted of murder and attempted armed robbery and sentenced to concurrent terms of 80 years for murder and 15 years for attempted armed robbery.

Opinion Below [Rule 14.1(d)]

The Opinion of the Appellate Court of Illinois, First Judicial District, Fifth Division, People v. Carlos Moore, No. 1-80-1615, filed February 26, 1993, affirming petitioner's convictions and sentence, is attached as App. A to this Petition, pp. App. 1-49. It is reported at 243 Ill.App.3d 583, 611 N.E.2d 1246, 183 Ill.Dec. 598 (1 Dist. 1993).

Jurisdictional Statement [Rule 14.1(e)]

(i) The date of the entry of the judgment sought to be reviewed is October 6, 1993--the order of the Illinois Supreme Court denying petition for leave to appeal from the Appellate Court's judgment of February 26, 1993. The Illinois Supreme Court's order denying discretionary review is set out as App. B, p. App. 50.

(ii) No petition for rehearing was filed in the Appellate Court, and no extensions respecting time for filing petition for certiorari have been sought in this Court.

(iii) No cross-petition exists.

(iv) This Court has jurisdiction to review the judgment in question via certiorari, pursuant to 28 U.S.C. 1257(a) and Rule 13.1 of this Court.

Constitutional Provisions [Rule 14.1(f)]

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Statement of the Case
[Rule 14.1(g)]

Statement of Facts

Defendant was convicted in a jury trial of murder and attempt armed robbery, and sentenced to an extended-term sentence of 80 years for murder and 15 years concurrent for attempt armed robbery. (R. 5-2736-37; 5-2904; 6-110)[1]

The evidentiary facts as to the occurrence itself on February 20, 1989, are fully set out in the Opinion, App. 18-22, 611 N.E.2d at 1251-52, 183 Ill.Dec. at 603-04, not repeated here to avoid unnecessary duplication.

Defendant's motion to suppress statements was denied after hearing. (R. 2-887)

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[1] The Record on Appeal in the Appellate Court consists of 6 volumes, hereinafter designated by volume and page, *viz.*: R. 5-2736-37 = Vol. 5, pages 2736-37, etc.

After defendant's motion for severance was denied, (R. 3-915; 5-2360-63), defendant and co-defendants Willie Oliver, Ulysses Edwards, and Lorenzo Wiley were jointly tried and convicted before a single jury, for the murder and attempt armed robbery of the deceased, William Kelly. (R. 5-2800-01)

Defendant and codefendant Wiley were jointly represented by Attorney Leo Fox. (R. 4-1387; 5-2363-2405; 5-2438-85) Codefendants Edwards and Oliver were jointly represented by Attorney Akim Gursel. (R. 4-1382)

On February 22, 1978 and February 23, 1978, defendant and codefendants Edwards, Oliver and Wiley were picked up by the police at different times and locations. (R. 4-1644, 1648, 1657, 1694, 1790) Each made statements, ultimately, court-reported, incriminating himself

and the codefendants as participating in the crime, and these confessions were admitted into evidence at their joint trial. (R. 4-2025-45 [Oliver]; R. 4-2051-79 [defendant]; R. 4-2090-2104 [Edwards]; R. 4-2109-23 [Wiley])

Codefendants Edwards (R. 5-2289-2327), Wiley (R. 5-2364-2406) and defendant (R. 5-2439-2486) all testified, each, denying the truth of his respective confession, asserting police coercion, and asserting an alibi. While co-defendant Oliver did not testify, (R. 2427-34), his defense counsel adopted the same position, that is, that Oliver's statement had been coerced. See App. 5-6, 611 N.E.2d at 1249, 183 Ill.Dec. at 601.

Lack of Cross-Examination

The confessions of all four defendants were admitted in evidence in

the joint trial. (R. 4-2025-45 [Oliver]; R. 4-2051-79 [defendant]; R. 4-2090-2104 [Edwards]; R. 4-2109-23 [Wiley])

As to nontestifying codefendant Oliver: defendant's attorney called Oliver to the witness stand in an attempt to examine him. (R. 5-2427-34) Upon Oliver's refusal to testify, the court denied defendant's motion for mistrial based on inability to examine Oliver, whose confession incriminating defendant was admitted in evidence at the joint trial. (R. 5-2356-61; 5-2434)

As to the two testifying codefendants:

Wiley was represented by the same counsel as defendant; hence, counsel's examination of Wiley was direct examination, and there was no cross-examination/confrontation as such.

Edwards was not cross-examined by defendant's counsel, due to the court's ruling--prompted by co-counsel's objections to defendant's attorney examining any of co-counsel's witnesses --which barred defendant's attorney from cross-examining witnesses called by Edwards' attorney. (R. 5-2251-52) This ruling disabled counsel from cross-examining codefendant Edwards when he testified. (R. 5-2253) Accordingly, there was no cross-examination of codefendant Edwards by defendant's attorney, when Edwards testified at the joint trial. (R. 5-2253, 5-2327) Fairly viewed and construed, the court's ruling (R. 5-2251-52) barred defendant's counsel from cross-examining any witnesses called in codefendant Edwards' case. Via its ruling, the trial court announced that defendant's attorney was

"not allowed" to cross-examine the witnesses codefendant Edwards was calling in "[his, i.e., Edwards'] case." (R. 5-2251-52)

Details of the Confessions

Each of the statements admitted the declarant's personal participation in the crime, and implicated all of the others. See App. 24-29, 611 N.E.2d at 1252-53, 183 Ill.Dec. at 604-05.

While Asst. State's Attorney Hyman testified that Wiley told him that Moore came in "and fired at" the deceased, (R. 4-2109), Wiley's court-reported statement, taken immediately thereafter, does not contain any statement that defendant came in "and fired at" the deceased, or that defendant fired a gun at any time. (R. 4-2120; 4-2115-23)

In fact, contrary to Hyman's testimony concerning Wiley's initial

statement to him implicating defendant as a shooter, Wiley stated in the court-reported statement that he ran out of Kelly's apartment after Kelly pulled a gun and fired a shot, and that he did not know what happened after that. App. 29, 611 N.E.2d at 1253, 183 Ill.Dec. at 605. Other than this, Wiley's statements were substantially identical to the others. Ibid.

State's Improper Use of Confessions

Although "The jury was instructed to consider each confession only against the person who made it," App. 11-12, 611 N.E.2d at 1250, 183 Ill.Dec. at 602, the State in closing argument asserted that the various statements could be considered interchangeably amongst and against all the defendants. (R. 5-2606, 2613, 2821, 2890)

Evidence re Voluntariness of Defendant's Confession

The record is undisputed and uncontradicted that defendant is an epileptic who, for most of his life, including the time immediately preceding his arrest, was required to take daily doses of Dilantin to forestall epileptic seizures. (See R. 2-593-621.) Defendant testified--without contradiction or rebuttal--that after he was transferred to the Cook County Jail and continuously thereafter, the County's doctors maintained his daily dose of Dilantin medication. (R. 2-594-95) After defendant testified thus on the motion to suppress statements, the only rebuttal witness called by the State was the court reporter who reported defendant's statements. No medical evidence was presented to

contradict or rebut that defendant was and is an epileptic, currently being maintained on appropriate medication therefor by County doctors.

Defendant was arrested on February 22, 1978--according to police, at 4:00 p.m.--and kept in custody for some 12 hours before making the second of two court-reported statements; one statement was made at 1:40 a.m. on February 23, 1978 and the second at 4:20 a.m. on February 23, 1978. With particular reference to when he was in police custody being interrogated, defendant testified that without his medication, he felt that he might have a seizure and felt "nervous" and shaky, App. 37, 611 N.E.2d at 1255, 183 Ill.Dec. at 607; he testified that during the custodial questioning, he blacked out several times, requested his medication, and the

police promised to try to find him some aspirin but did not even do that. (R. 2-398, 593-95, 602-21)

There was also uncontradicted and unrebutted testimony from codefendant Edwards, specifically corroborating defendant's testimony concerning seizures while in custody; Edwards testified that he witnessed this. (R. 2-779, 783-84, 787, 798)

Defendant's condition was further corroborated by evidence and testimony from medical personnel from the Cermak Hospital, presented at trial by the State in rebuttal. (R. 5-2547)

Defendant reiterated his motion to suppress testimony in this regard, at trial, and it was not rebutted there, either. (R. 5-2451-62)

Joint Representation

Because of single counsel's joint

representation of both Wiley and defendant, counsel could not and did not effectively cross-examine Wiley concerning the discrepancies in his statements, as pointed out above, pp. 8, 10-11, supra. The discrepancy could have, but was not, utilized by counsel for defendant in defendant's favor, for Wiley's court-reported statement fails to include any mention that defendant "fired at" deceased, of that he fired a gun at any time--contrary to ASA Hyman's testimony that Wiley's oral statement that preceded the court-reported one, included such detail incriminating as to defendant. (R. 4-2109, 2120)

Due to his joint representation of both Wiley and defendant, counsel not only was precluded from effectively utilizing this discrepancy to defendant's advantage; moreover, he

could not and did not level any appropriate attack upon Wiley's veracity at all.

Raising Federal Questions Below
[Rule 14.1(h)]

Question 1. The issue that defendant was denied a fair trial because of the joint trial at which the co-defendants' statements incriminating him were admitted, was first raised when defendant moved for severance, which was denied. (R. 3-915; 5-2360-63)

Regarding the non-testifying codefendant, Oliver, defendant's inability to cross-examine him because he did not testify, was raised via motion for mistrial upon Oliver's refusal to testify when called to the stand by defendant's attorney--which motion for mistrial was denied. (R. 5-2356-61; 5-2434)

As to testifying codefendant Edwards, the trial court barred defendant's counsel from cross-examining him by its ruling forbidding cross-examination of any witnesses called by Edwards' attorney in his case. (R. 5-2252)

These matters, as well as the claim that Wiley was not cross-examined by defendant's counsel because Wiley was jointly represented by the same counsel who represented defendant, were presented as part of defendant's Point 1 in his Brief in the Appellate Court. (Appellant's Brief, Point 1, pp. 8-13)

The Appellate Court, after first determining that the Cruz decision was applicable, App. 14, 611 N.E.2d at 1250, 183 Ill.Dec. at 602, ruled against defendant in all respects, on the merits, concerning the issues

encompassed within Question 1. App. 14-32, 611 N.E.2d at 1250-54, 183 Ill.Dec. at 602-06.

Defendant raised the same issues in the Illinois Supreme Court as Point 1 of his Petition for Leave to Appeal (PLA pp. 1, 4-10), which that Court denied. (App. 50)

Question 2. The issue that defendant was denied a fair trial by reason of his involuntary confession, was first raised in the trial court via defendant's motion to suppress statements, which the court denied after evidentiary hearing. (R. 2-887)

He raised the issue on appeal as Point 2 in his Appellant's Brief, pp. 14-15, and the Appellate Court, on the merits, ruled against him, App. 32-40, 611 N.E.2d at 1254-55, 183 Ill.Dec. at 606-07, holding that the trial court's

order was not against the manifest weight of the evidence. App. 33, 611 N.E.2d at 1254, 183 Ill.Dec. at 606.

He raised the issue in the Illinois Supreme Court in his Petition for Leave to Appeal (PLA pp. 1, 11-12), which that Court denied. (App. 50)

Question 3. Defendant first raised the issue of ineffective assistance of counsel due to improper joint representation that resulted in an actual conflict of interest that prejudiced defendant, on appeal in the Illinois Appellate Court, as Point 3. (Appellant's Brief, p. 16) The Appellate Court deemed the issue waived because not raised below, either at trial or in post-trial motion, App. 40-41, 611 N.E.2d at 1255, 183 Ill.Dec. at 607, and therefore reviewed the matter on a "plain error" basis only; on which

basis, the Court held defendant, to prevail, must show an actual conflict that adversely affected his counsel's performance, App. 42, 611 N.E.2d at 1256, 183 Ill.Dec. at 608, and ruled that he had not. App. 40-44, 611 N.E.2d at 1255-56, 183 Ill.Dec. at 607-08. The Court reached this conclusion despite that the attorney who represented defendant on post-trial motions, and did not raise therein the issue of improper joint representation, was the same attorney who represented defendant and Wiley jointly at trial. App. 40-41, 611 N.E.2d at 1255, 183 Ill.Dec. at 607.

In the Illinois Supreme Court, defendant raised the issue of improper joint representation in his Petition for Leave to Appeal (PLA Point 3, pp. 2, 13-14), which that Court denied. (App. 50)

REASONS FOR GRANTING THE WRIT

1. The Illinois reviewing court decision conflicts with a decision of this Court, Cruz v. New York, 481 U.S. 186, by misapplying to the facts of the instant case, constitutional principles of 14th Amendment due process and 6th amendment right to confrontation.

The Illinois reviewing court held that petitioner's constitutional rights to due process of law as per the 14th Amendment and his 6th Amendment right of confrontation, were not violated, and that he was not deprived of a fair trial, by the use against him, at their joint jury trial, of the "interlocking" confessions of (i) a non-testifying codefendant and (ii) two codefendants who testified but were not properly cross-examined by defense counsel--who jointly represented both defendant and

one of the testifying co-defendants.[2]

This decision is clearly wrong, and violates constitutional principles set out by this Court in Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968), and clarified and applied in Cruz v. New York, 481 U.S. 186, 95 L.Ed.2d 162 (1987).

Principles of Bruton, more fully explicated in Cruz, render such use of the codefendants' statements at their joint trial, violative of defendant's constitutional rights to confrontation and due process.

All three codefendants' confessions implicated petitioner, and petitioner also made incriminating statements; at trial petitioner testified, repudiating

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[2] This joint representation is separately asserted as a constitutional violation; see Question 3.

his confession. Therefore, this is a scenario expressly recognized in Cruz as most prejudicial to a defendant's aforesaid constitutional rights.

Contrary to the Appellate Court's position that Cruz does not control here, where defendant himself made a confession which was "interlocking" with those of the three codefendants, Your Honors expressly recognized that **where, as here, the defendant repudiates his confession, he is indeed harmed by admission at a joint trial of the confession of a nontestifying codefendant, even if "interlocking"**:

> "In fact, it seems to us that 'interlocking' bears a positively inverse relationship to devastation [of a defendant's case]. **A codefendant's confession will be** relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but

enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant were *standing by* his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to avoid his confession--on the ground that it was not accurately reported, or that it was not really true when made. . . . In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case, whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false. . . .

"The law cannot command respect if such an inexplicable exception [i.e., interlocking confessions] to a supposed constitutional imperative is adopted. **Having decided Bruton, we must face the honest consequences of what it holds.**" 481 U.S. at 192-93, 95 L.Ed.2d at 171. (Italic emphasis in original; boldface emphasis added.)

The Appellate Court's inane analysis to the effect that since defendant himself made an interlocking confession, there was no prejudice a'la Cruz, is clearly wrong, and a perversion of the principles of Bruton and Cruz, applying constitutional imperatives. Clearly, the confession of Oliver, who did not testify, is barred thereby.

As to the codefendants who did testify, defendant has demonstrated in his Statement of Facts, pp. 8-10, supra, that neither was properly cross-examined by defense counsel--Edwards by reason of the trial court's rulings, and Wiley due to joint counsel's conflict. This lack of effective cross-examination places the statements of these codefendants on the same footing as statements of a nontestifying codefendant, in that defendant was precluded from exercise of

his Sixth Amendment right of confrontation.

Ineffectiveness of Instructions

In Bruton, Your Honors recognized that instructions that the jury disregard codefendant's statements in determining a defendant's individual guilt or innocence, are ineffective. Here, even though the jury was instructed to consider each confession only against the person who made it, any arguable benefit defendant may otherwise have derived therefrom was emasculated by the prosecutor's express, repeated argument to the jury that the various statements could be considered interchangeably amongst and against all the defendants. See p. 11, supra.

Certiorari should be allowed to enforce compliance with Bruton, Cruz, and the Constitution.

2. The Illinois reviewing court's determination that denial of petitioner's motion to suppress his incriminatory statements was correct, conflicts with controlling constitutional principles respecting burden of proof of voluntariness of confessions as expressed in such decisions of this Court as Lego v. Twomey, 404 U.S. 477, and respecting involuntariness of a confession obtained while a defendant is in pain and denied medication, as per Mincey v. Arizona, 437 U.S. 385.

Petitioner moved to suppress his confession on grounds it was involuntary and coerced. His testimonial claims (both at pre-trial hearing on motion to suppress, and at trial) of involuntariness due to incapacitation stemming from his epilepsy--more precisely, from authorities withholding medication necessary for treatment of his epilepsy --included petitioner's testimony, corroborated by one of the co-defendants, that petitioner suffered

several seizures during interrogation, and petitioner's further testimony that he requested his medication, which requests were denied (not even aspirin was provided, though promised). All the foregoing evidentiary details were wholly unrebutted. (See Statement of Facts, pp. 12-14, supra.)

Curiously, yet not surprisingly, the Appellate Court, in holding defendant did not demonstrate how his condition affected voluntariness of his statements, App. 40, 611 N.E.2d at 155, 183 Ill.Dec. at 607, has utterly ignored the very existence of the aforesaid testimonial evidence concerning his blackouts (seizures) while in custody, and that his requests for medication were ignored, prior to his giving the second statement.

This Court has recognized that a

confession obtained when defendant is in medical pain, is involuntary. Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290 (1978); see also Beecher v. Alabama, 408 U.S. 234, 33 L.Ed.2d 317 (1972).

The Appellate Court's approach to, and decision of, this issue violates this Court's holding in Lego v. Twomey, 404 U.S. 477, 30 L.Ed.2d 618 (1972), as to burden of proof, that due process requires that the prosecution must prove by **at least** a preponderance of the evidence, that a confession challenged as involuntary, was in fact voluntary. Clearly, the prosecution has not met that burden here, where there is testimony, corroborated and without rebuttal, that defendant underwent blackouts or seizures while in custody, as well as testimony that the authorities withheld necessary

medication.

Certiorari should be allowed to compel compliance with controlling constitutional precedent concerning burden of proof where a confession is claimed to be involuntary--here, for medical reasons.

3. The Illinois court erroneously held that joint representation of petitioner and codefendant Wiley by single counsel did not result in an actual conflict of interest that deprived petitioner of effective assistance of counsel and a fair trial, in violation of his constitutional rights under the 6th and 14th Amendments.

Despite the demonstration at bar concerning defendant's counsel's painful failure effectively to utilize to defendant's best advantage, the major discrepancy in his joint client Wiley's court reported statement (see Statement of Facts, pp. 14-16, supra), with

court reported statement (see Statement of Facts, pp. 14-16, supra), with resulting prejudice to defendant, the Appellate Court has refused to acknowledge the reality of the conflict that manifested itself to defendant's detriment.

Here, defense counsel actively represented conflicting interests. Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333 (1980).

Moreover, in utilizing, to find waiver--and thereby imposing a more difficult, "plain error" standard upon the defense--the fact that the **same** joint counsel failed to assert his own conflict in defendant's post-trial motion, the State reviewing court ignores compelling precedent, not to mention realities of human nature. Courts uniformly realize that counsel is

not expected to raise issues concerning his own ineffectiveness, and therefore do not impose unrealistic standards concerning raising the issue below.

Courts do not expect trial counsel to argue his own ineffectiveness. For example, in United States v. Castillo, 965 F.2d 238 (7 Cir. 1992), the Court of Appeals said:

> "Normally of course an issue that was not and could not have been raised at trial cannot be raised on appeal, although if it is a criminal case it can be raised in a postconviction proceeding. And that is the character of a complaint about trial counsel's performance--he isn't going to raise it at trial; he didn't here, of course." Id. at 243. (Emphasis in original.)[3]

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[3] So, too, in Illinois. People v. Ruiz, 132 Ill.2d 1, 547 N.E.2d 170, 173, 138 Ill.Dec. 201, 204 (1989) ("[C]ounsel cannot be expected to argue his own incompetency . . . ."); accord, People v. Gaines, 105 Ill.2d 79, 473 N.E.2d 868, 875, 85 Ill.Dec. 269, 276 (1984).

Certiorari should be allowed, both to vindicate petitioner's rights and to reiterate applicable constitutional principles as to the right to conflict-free counsel.

C O N C L U S I O N

For any or all of the foregoing reasons, certiorari should be allowed. And, on the merits, defendant's convictions should be vacated, and the cause remanded with appropriate directions.

Respectfully submitted,

FREDERICK F. COHN
DENNIS M. DOHERTY

Attorneys for Petitioner

APPENDIX

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Appendix A

App. 1

Fifth Division
February 26, 1993

No. 1-80-1615

THE PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
v.	)	
CARLOS MOORE,	)	HONORABLE WILLIAM COUSINS, JR.
Defendant-Appellant.	)	JUDGE PRESIDING.

JUSTICE MURRAY delivered the opinion of the court:

Defendant Carlos Moore (Moore) was tried jointly with codefendants Ulysses Edwards, Willie Oliver and Lorenzo Wiley for the murder and attempted armed robbery of William Kelly. The murder occurred in Kelly's apartment on Chicago's near north side in 1978, more than 14 years ago. A jury found Moore and the three other co-defendants guilty as charged after a July 1979 trial. Moore was then sentenced to concurrent

terms of 80 years for murder and 15 years for attempted armed robbery.

The convictions of codefendants Edwards, Wiley and Oliver were affirmed by this court in an order dated May 21, 1982, issued pursuant to Supreme Court Rule 23 (Ill. Rev. Stat. 1981, ch. 110A, par. 23), meaning that the decision was unreported and of no precedential value. (See consolidated case Nos. 79-2469, 80-1404.) Moore, too, filed a timely appeal from his convictions and sentence, however, his appeal was dismissed for want of prosecution in 1980 after his retained counsel failed to file a docketing statement.

In 1983 the Attorney Registration and Discplinary Commission (ARDC) suspended defendant's attorney for 18 months, due in part to his neglect of defendant's appeal. Thereafter, Moore

moved to have his appeal reinstated and, in 1990, the Illinois Supreme Court ordered Moore's direct appeal to this court reinstated. (See People v. Moore (1990), 133 Ill.2d 331, 140 Ill.Dec. 385, 549 N.E.2d 1257.) Moore's appellate brief was then filed in this court on April 23, 1991, the State's response was filed November 22, 1991, and Moore's reply was filed January 28, 1992.

The case languished in this court until December 1992, at which time the case became the responsibility of newly-seated appellate judge, Justice Cousins, who had presided over the trial in 1978. Consequently, Justice Cousins recused himself from the case. In January 1993, nearly 15 years after Kelly's death, oral argument was held on Moore's appeal for the first time. For reasons that

follow, we now affirm Moore's convictions and sentence.

On appeal Moore does not deny his involvement in Kelly's murder and attempted robbery. Instead he seeks a new trial, based upon certain alleged procedural errors, or a reduction of his sentence. The issues raised are: (1) whether Moore should be entitled to a new trial because a nontestifying codefendant's confession was admitted into evidence at the joint trial, even though Moore's own confession was also admitted, (2) whether the State failed to prove that Moore's confession was voluntary, (3) whether Moore's trial counsel labored under an actual conflict of interest due to his joint representation of Moore and codefendant Wiley, (4) whether Moore was denied due process of law because the trial court

barred the testimony of two witnesses tendered by the defense, and (5) whether Moore's extended term sentence was improper and excessive.

The first issue is whether defendant was denied a fair trial because a nontestifying codefendant's statement was admitted into evidence, not as evidence against Moore but as evidence against that codefendant. The record shows that prior to trial all of the defendants moved for severance, which was denied, and that they were then tried jointly. Moore and Wiley were jointly represented by a single attorney, while Edwards and Oliver were jointly represented by another attorney. Each of the codefendants made both oral and written inculpatory statements subsequent to arrest, which were admitted as evidence against them at

trial. Moore, Wiley and Edwards each testified in their own defense at trial, each claiming that their statements were not true and that the police had coerced them into making the statements. Oliver did not testify at trial. However, his defense counsel adopted the same position, i.e., that Oliver's statement had been coerced.

Relying on Cruz v. New York (1987), 481 U.S. 186, 95 L.Ed.2d 162, 107 S.Ct. 1714, Moore contends that his right of confrontation, guaranteed to him through the sixth and fourteenth amendments of the United States Constitution, was violated and that he was denied a fair trial because Oliver's statement was admitted into evidence at the joint trial although Oliver did not testify and, therefore, was not subject to cross-examination. In addition, Moore

claims that he was further denied a fair trial due to the admission of Edwards' and Wiley's statements because, although they testified at trial, Moore's trial counsel did not cross-examine them[1]. Furthermore, Moore contends that the admission of the codefendants' statements violated Illinois evidentiary law.

Although defendant declares that the above-cited errors occurred, he does not demonstrate the error in the context

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[1] Moore contends on appeal that he was restricted from cross-examining codefendants Wiley and Edwards. However, this statement is somewhat misleading. The trial court did restrict Moore's counsel from cross-examining codefendant Edwards' mother. The court's dialogue concerning this matter reveals that the court limited cross-examination by Moore's counsel because it would be duplicative of cocounsel's direct examination. There is no indication that Moore's counsel ever attempted to cross-examine Edwards.

Finally, it is important to remember here that Moore's counsel also represented Wiley. Therefore, Moore's counsel did not cross-examine him, but instead, directed the examination of this witness.

of his case. When doing so it is clear that Moore's claims are without merit.

As a general proposition, defendants who are indicted jointly should be tried jointly, especially where the crime involves a common scheme or plan. (People v. Lincoln (1987), 157 Ill.App.3d 700, 109 Ill.Dec. 958, 510 N.E.2d 1026.) However, under certain circumstances, substantial fairness may require a different result. In 1968 the United States Supreme Court determined one such circumstance. (See Bruton v. United States (1968), 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620.) In the Bruton case two defendants were tried jointly for armed robbery. One of the defendants confessed and inculpated the other, the other defendant made no admission of guilt. The Bruton court held that under these circumstances it

was unfairly prejudicial to defendant, notwithstanding any cautionary or limiting instructions that might be given to the jury, to admit codefendant's incriminating statement during the joint trial if codefendant also failed to testify at trial. The Court reasoned that this evidence violated defendant's sixth amendment right of confrontation because there was too great a risk that this evidence, though not admitted against defendant directly, would be considered by the jury when assessing his guilt or innocence. Furthermore, this evidence, though devastating to defendant's case, was inherently unreliable. There was a high probability that codefendant would want to shift or spread blame, yet his motives could not be tested through cross-examination.

Some years later, an exception to the Bruton rule was set forth by a divided supreme court in the plurality decision authored by Justice Rhenquist *[sic.]*, Parker v. Randolph (1979), 442 U.S. 62, 60 L.Ed.2d 713, 99 S.Ct. 2132. According to the decision in Parker, the Bruton rule was not violated and reversal of a defendant's conviction was not mandated if the defendant also made a confession and his confession "interlocked" with the nontestifying codefendant's confession which implicated him[2].

Parker was the law at the time of

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[2] A plurality of four justices found no sixth amendment violation. The remaining four justices who considered the case subscribed to Justice Blackmun's view, that the introduction of a nontestifying codefendant's confession was a violation of the sixth amendment and error under the Bruton case, but that the error could be rendered harmless by the introduction of defendant's own interlocking confession. In Parker, Justice Blackmun did, in fact, find the error to be harmless, thereby producing a majority for affirmance.

Moore's trial. Consequently, when ruling on defendants' motions for severance the trial court considered the fact that the confessions of all four codefendants in this case were substantially identical of "interlocking" and concluded that severance was not necessary because, whether or not any of the defendants testified, the admission of their confessions would not be error under the Parker exception to the Bruton rule.

Thereafter, the four codefendants were jointly tried and the oral and written confessions of each of the defendants were introduced at trial. Moore, Wiley and Edwards chose to testify at trial, denying the truth of the confessions and contending that the police had coerced them into making the statements. The jury was instructed to

consider each confession only against the person who made it.

Had Moore's appeal proceeded normally, the introduction of the contents of each codefendants' out of court statements, most likely, would not have been an issue based on the Parker opinion. However, during the interim between defendant's conviction and this appeal, the United States Supreme Court decided the Cruz case, wherein the Court decided to adopt Justice Blackmun's approach to the admission of nontestifying codefendant's interlocking confessions, as set forth in Parker. (See Cruz v. New York (1987), 481 U.S. 186, 95 L.Ed.2d 162, 107 S.Ct. 1714.) Thus, according to Cruz, the admission of a nontestifying codefendant's extra-judicial statement violates a defendant's sixth amendment right of

confrontation and constitutes reversible error, unless the statement bears sufficient indicia of reliability for it to be independently admitted against defendant or its admission is deemed harmless beyond a reasonable doubt. See also Lee v. Illinois (1986), 476 U.S. 530, 90 L.Ed.2d 514, 106 S.Ct. 2056.

Moore seeks to take advantage of the change in the law brought about by the decision in Cruz and the State does not argue that Cruz is inapplicable to this appeal. (See Graham v. Hoke (2d Cir. 1991), 946 F.2d 982, the Cruz rule is to be applied retroactively; People v. Kubik (1991), 214 Ill.App.3d 649, 158 Ill.Dec. 152, 573 N.E.2d 1337.) Nonetheless, the State argues that, under the attendant circumstances of this case, it was not error to have admitted Oliver's statement at trial.

Citing to Lee v. Illinois, the State contends that there was sufficient indicia of reliability for Oliver's confession to have been admitted against Moore as substantive evidence. Alternatively, the State argues that any error that may have resulted from the admission of Oliver's statements at trial was harmless beyond a reasonable doubt. In addition, because the admission of Oliver's statement did not constitute prejudicial error, the State argues that Illinois constitutional and evidentiary law was not abrogated.

After considering all of the arguments presented by both parties we find that, despite the applicability of the Cruz rule to the present case, Moore is not entitled to a new trial. First of all, defendant provides no support for the theory that his rights protected

under State and Federal constitutional law were violated by the admission of the confessions of Wiley and Edwards, both of whom testified at trial. In fact, the only case cited by defendant, People v. Jones (1988), 121 Ill.2d 21, 117 Ill.Dec. 164, 520 N.E.2d 325, holds that when codefendants take the stand and repudiate their earlier statements which inculpate a defendant there is no need for cross-examination since the repudiation is more favorable than any cross-examination could possibly be. Moore seeks to distinguish this case from Jones, claiming that there was a conflict of interest (Moore's third issue on appeal) however, for reasons that we will discuss later on in this opinion we do not agree that a conflict existed. Therefore, we find the Jones case directly applicable to the case at

bar and conclude that the admission of Edwards' and Wiley's statements did not offend either State or Federal law. See People v. Collins (1989), 184 Ill.App.3d 321, 132 Ill.Dec. 173, 539 N.E.2d 736, only nontestifying codefendant's statements constitute inadmissible hearsay under Illinois law and reversible error results only if admission of the statement is found to be prejudicial error.

Secondly, the Cruz court makes it clear that when the inculpatory statements of a nontestifying codefendant is admitted at a joint trial, reversal of the conviction is not mandated. If there are sufficient indications that a statement is reliable, it may be directly admissible against the defendant. (See Lee v. Illinois; Ohio v. Roberts (1980), 448

U.S. 56, 65 L.Ed.2d 597, 100 S.Ct. 2531.) Alternatively, the circumstances of the case may be analyzed under the harmless error rule.

When considering the facts of this case we find that, under Federal evidentiary standards, Oliver's statement could have been admitted as substantive evidence against Moore since there was ample evidence that Oliver's statements were reliable. Furthermore, any error that may have derived from the admission of Oliver's statements and any prejudice that might have inured to Moore as a result was harmless beyond a reasonable doubt. The evidence adduced at trial, independent of Oliver's statement, overwhelmingly supported Moore's conviction. Thus, the admission of Oliver's statements did not deny him a fair trial. Furthermore, although

there is some doubt whether a separate analysis under Illinois constitutional and evidentiary law is even necessary (see People v. Duncan (1988), 124 Ill.2d 400, 125 Ill.Dec. 265, 530 N.E.2d 423), we find no prejudicial error under State law.

Trial testimony established that the victim, William Kelly, was shot in his own home in the early morning hours of February 20, 1978. On the day in question Kelly was 61 years old and he lived in the first-floor apartment at 1506 North Hudson in Chicago. Kelly's daughter, Oralee White, and his granddaughter, Rhonda White, were staying with Kelly in the apartment. Another daughter, Elizabeth Boone, and her boyfriend, Milton Davis, lived in the apartment above Kelly's.

Kelly was well known in the area as

"Poppa Kelly" or "the candyman" because he sold candy and soft drinks out of his kitchen to the neighborhood children. Because Kelly had a pacemaker and didn't sleep well lying down, he often slept sitting in a chair in the dining room, just off the kitchen. Consequently, he was known to answer his back door almost anytime of the day or night to sell potato chips, candy, soft drinks or other similar refreshments.

At about 3 a.m. on February 20, 1978, the four defendants knocked at Kelly's back door and, under the guise of wanting to buy some candy and refreshments, entered the apartment. Shortly thereafter Rhonda White, who was sleeping on a couch in the living room, was awakened by the sound of gunshots. Rhonda testified that after the gunshots she heard the back door slam and

then heard the sound of people running down the alleyway along the side of the house. Immediately thereafter her grandfather walked into the living room. She could see that he was bleeding and he told her that he had been shot. Mr. Kelly, who was also carrying a gun, indicated to Rhonda that he believed that "he got [shot] one of them." Rhonda awakened her mother, Oralee, who had also been sleeping on a couch in the living room. Rhonda then knocked at the door of the upstairs apartment and summoned help.

Milton Davis, who lived upstairs with Kelly's daughter, Elizabeth Boone, also testified. He, too, was awakened by the sound of gunshots in the early morning hours of February 20, 1978. After the gunshots he heard someone ring his doorbell. When he answered the door

he saw Rhonda, who told him that Kelly had been shot. Elizabeth Boone called the police while Milton Davis went downstairs.

When Davis arrived downstairs he found Kelly lying on the floor of the hallway. He helped Kelly to sit up and at this time Kelly told him that three or four black men had attempted to rob him and that he (Kelly) had been able to shoot one or two of them while resisting their efforts.

The police arrived within a few minutes and found Kelly still alive and conscious but unable to speak. An ambulance was called and Kelly was taken to Henrotin Hospital. He died shortly thereafter.

Dr. Malak, Assistant Chief Medical Examiner for Cook County testified at trial that the autopsy he performed on

Kelly revealed that Kelly suffered three gunshot wounds. Kelly died as a result of two of them, one to his chest and the other to his arm. A bullet and a bullet fragment were recovered from Kelly's body. The bullet was .38 caliber and the bullet fragment, although too mutilated to identify precisely, was consistent with a .38 caliber bullet. Based on the caliber of the bullet and Moore's statements, it was shown that the bullet that entered Kelly's chest came from the gun that Moore had carried.

Chicago Police investigator Lawrence Flood testified that on the morning of February 22, 1978, he spoke with a person by the name of Raymond Hampton. As a result of this conversation he and his partner, Investigator Schuler, left Area 6

station and attempted to locate four persons, Edwards, Oliver, Moore and Wiley, in conjunction with the Kelly murder.

At about 4 p.m. they found Moore at 1410 N. Cleveland and he accompanied them to area 6. Investigator Flood also testified that he took into possession a blue coat which he found hanging on the back of Moore's bedroom door. The coat had dark spots on it, which later testimony proved to be blood. Testing conducted on these blood spots revealed that the blood did not match Moore's blood type or the blood type of any of the three codefendants. The blood did, however, match Kelly's blood type and subtype.

Oliver was taken into custody soon after Moore and they were both transported to the station together.

Upon their arrival at area 6 station, the police first interviewed Oliver. Within a short period of time Oliver gave an oral statement to the police in the presence of Assistant State's Attorney Hyman, admitting involvement in the Kelly murder. He then repeated his statement for a court reporter and signed the transcribed statement.

At about 10:30 p.m. on February 22, 1978, after Oliver's statement was transcribed, Oliver's statement was taken into the interview room where Moore was being held. After being advised of his rights, Moore was shown Oliver's statement. Moore then gave his own statement to police, in the presence of Assistant State's Attorney Hyman.

According to Moore's statement, on the evening of February 19, 1978, Moore, Curtis Royal and the three codefendants

(Edwards, Oliver and Wiley) decided to rob Kelly. Carrying two guns, they proceeded to Kelly's home. At Kelly's, Wiley and Oliver knocked at the back door and told Kelly that they wanted to purchase something. Once Wiley and Oliver were admitted into the home, Edwards entered the home carrying one of the guns and announced a stick-up. Kelly produced his own gun and began firing at them. Edwards struggled with Kelly and fired his revolver at Kelly two or three times. Moore, who was in possession of the other gun, a .32 caliber revolver, then entered the apartment. He pushed Oliver out of the way and, he claimed, fired his gun into the air. After the incident the four men ran out of Kelly's apartment and back to the apartment Moore shared with his sister, Zenita Underwood.

Moore, with the assistance of Oliver, provided police with a hand-drawn diagram depicting Kelly's kitchen, showing each defendant's position during the incident. Both Moore and Oliver signed the diagram and the paper was then time-stamped at about 1 a.m. on February 23, 1978. Immediately thereafter, at about 1:30 a.m. on February 23, 1978, Moore repeated his statement before a court reporter. During this statement he referred to the diagram that he had drawn.

In addition, Moore gave the police a note for his sister, Zenita Underwood, instructing her to turn over the guns to the police. Investigators Flood and Epplan took the note to Zenita Underwood. At Underwood's request they transported her to the station, where she spoke to Moore. After her

conversation with Moore, Underwood accompanied the police officers to a residence at 5739 Iowa. She entered the building alone and returned to the police car with two weapons, which she turned over to the police. The weapons were identified as a .38 caliber Smith and Wesson revolver and a .38 special Smith and Wesson revolver.

Edwards, having learned that the police were looking for him, came to area 6 station with his mother in the early morning hours of February 23, 1978. At about 2 a.m. Carlos Moore was brought into the interview room where he was being held. Moore told Edwards what he had told the police and then was removed from the room. Edwards, after being advised of his rights, agreed to speak with the police. Edwards admitted that he and the other defendants went to

Kelly's home to rob him. He further indicated that, after Wiley and Oliver gained entry into the Kelly home, he entered and announced a stick-up. Kelly pulled a gun, a struggle ensued and shots were exchanged. Moore then entered the room and fired a shot. After the incident they all ran back to Moore's apartment.

At about 2:50 a.m. Edwards repeated his statement before a court reporter. In this statement Edwards identified the guns that had now been recovered through Zenita Underwood as the guns that were used in the incident.

At about 3:10 a.m. on February 23, 1978, Investigators Flood and Epplan brought Wiley into area 6. Moore was allowed to speak with Wiley briefly and then Wiley was advised of his rights. Thereafter Wiley gave an oral statement

to the police which was later repeated before a court reporter. Wiley's statements were substantially identical to the others, except that in his court reported statement Wiley indicated that he ran out of Kelly's apartment after Kelly pulled a gun and fired a shot. Consequently, Wiley stated that he did not know what happened after that.

Finally, at about 4:15 a.m. on February 23, 1978, Moore gave another court-reported statement. In this statement Moore identified the guns recovered by Zenita Underwood as the guns used during the attempted robbery at Kelly's apartment. Moore also stated that he had instructed Zenita to turn the guns over to police.

Although there were enough statements in this case for an entry in the Guinness Book of Records, it is

clear from the evidence, as set forth above, that there was more than sufficient evidence to prove Moore's guilt, even without considering any of the codefendants' statements. Moore alone generated an oral statement, two statements transcribed by a court reporter, a hand-written note to his sister and a hand-drawn diagram of Kelly's kitchen. In addition, Moore's coat was spotted with blood that matched Kelly's type and subtype and the guns, which Moore caused to be recovered, were consistent with the bullets found in Kelly's body.

Edwards and Wiley each made two statements, the admission of which did not, as noted above, violate Moore's sixth amendment right of confrontation. Additionally, it is significant to note that their statements, as well as

Oliver's statement, enmeshed with Moore's confession in every material detail. This was not a situation where the codefendants attempted to shift blame, exculpate themselves or inculpate Moore to any greater extent than he did by his own confession. In fact, in most instances the other defendants' statements inculpated Moore far less than his own statements did. Furthermore, the statements conformed with and corroborated the physical evidence.

It is also significant that the circumstances under which these statements were made do not indicate any heavy handedness on the part of the police. The confessions were the result of questioning which occurred shortly after each defendants' arrest. Defendant's *[sic.]* were not held for lengthy periods of time while the police

attempted to gather evidence against them. For all these reasons, Oliver's statements may be considered highly reliable.

However, even if we did not find Oliver's statements admissible under the Lee standard, we would find that Oliver's statements were a mere redundancy of the abundant evidence properly presented at trial. Consequently, there is no question in this court's mind that the admission of Oliver's statements did not prevent Moore from obtaining a fair trial.

The next question presented for this court's consideration is whether the State failed to prove that Moore's statements were voluntary. The record shows that prior to trial Moore filed a motion to suppress his admissions and a hearing was held on the motion. After

considering the evidence presented at the hearing, the trial court concluded that Moore's statements were voluntary.

A trial court's determination that a defendant's statement was given voluntarily may not be reversed unless, based upon the totality of the circumstances, we can say that the trial court's ruling was against the manifest weight of the evidence. (People v. Terrell (1989), 132 Ill.2d 178, 198, 138 Ill.Dec. 176, 547 N.E.2d 145.) After reviewing the evidence, we find no basis for reversing the trial court's conclusion.

The standard by which a reviewing court must measure any claim of involuntariness does not depend on any singular factor, but upon the totality of circumstances. (People v. Ramey (1992), 152 Ill.2d 41, 57-58, 178

Ill.Dec. 19, 604 N.E.2d 275; People v. Redd (1990), 135 Ill.2d 252, 292, 142 Ill.Dec. 802, 553 N.E.2d 316.) Ultimately, the test is whether the conditions under which the statements were made indicate that defendant's will was overcome. (People v. Ramey; People v. Terrell, 132 Ill.2d at 198, 138 Ill.Dec. 176, 547 N.E.2d 145.) After the State presents a *prima facie* case that the confession was voluntary, the burden shifts to the defendant to show that the waiver of his rights and his decision to confess was not a knowing, intelligent and voluntary act. People v. Smith (1990), 199 Ill.App.3d 839, 145 Ill.Dec. 826, 557 N.E.2d 596.

Moore's claim on appeal is that his confessions were not voluntary due to an incapacity stemming from epilepsy. That Moore was afflicted with epilepsy seems

uncontradicted. But there is nothing in the record to suggest that his condition affected the voluntariness of his statements. Nor does Moore even attempt to enlighten this court on the manner in which his epilepsy might have disabled him.

At the hearing on Moore's motion to suppress his statements, Moore and his father both testified that Moore had suffered from epilepsy for some years. However, it was never contended in either the written motion or the oral clarification of the motion that Moore's counsel provided to the court, that Moore's epilepsy incapacited him to the extent that his admissions were involuntary. Nor was this argued during the motion or at trial. The main thrust of Moore's argument at the suppression hearing was that he was beaten by

police, deprived of basic amenities and refused access to his attorney. These were the primary bases upon which Moore relied to support his allegation of physical and mental coercion.

At trial Moore again indicated that he was physically and mentally coerced by the police, claiming that he was beaten and deprived of food and medication. However, he never stated or even implied that the lack of medication rendered him incapable of understanding the implications of the statements he was making.

Now on appeal Moore abandons all other the *[sic.]* previously-alleged bases for finding his statements involuntary and relies solely upon his epileptic condition. Without reference to supporting case law, Moore contends that because he was an epileptic and did

not receive medication for this condition during the time that he was in police custody, we must find that his statements were involuntary. We disagree.

In this case the State made a strong showing, supported by the testimony of three police officers, a court reporter and an assistant State's Attorney, that Moore knowingly waived his rights after being properly admonished. The testimony that the State presented indicated that Moore was conscious, coherent and fully cognizant of his own actions. Even defendant's own testimony supports this finding. Relevant to his epilepsy, defendant merely stated that without his medication he felt that he might have a seizure and felt "nervous" and shaky. He never indicated that he couldn't

understand the meaning of his actions. Consequently, we find that the mere fact that Moore suffered from epilepsy, without more, does nothing to overcome the State's *prima facie* showing that Moore voluntarily confessed to his participation in Kelly's murder. Considering the standard of review and the evidence, we must find that Moore's confessions were voluntarily made.

This court's own research revealed an extremely limited number of cases involving epilepsy. In People v. Romaine (1979), 79 Ill.App.3d 1089, 35 Ill.Dec. 485, 399 N.E.2d 319, the defendant's affirmative defense to charges of armed robbery and armed violence was that he was insane due to the fact that he suffered from limbic epilepsy. A psychiatrist testified that limbic epilepsy, also known as episodic

discontrol syndrome, differed from the more common convulsive types of epilepsy (i.e., the chronic disease which manifests itself through seizures which cause unconsciousness, shaking and falling down). The psychiatrist testified that a person suffering from limbic epilepsy could manifest a state of extreme rage. Such a person might be physically abusive and, though he could understand what was happening, would not have control over his behavior. Despite this testimony, the jury rejected the defense and the reviewing court affirmed, finding that the evidence did not necessarily require a finding that defendant did not have the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

Ironically, in United States v.

Rose (1981), 657 F.2d 270, defendant claimed that an admission he made was not voluntary because, among other reasons, it was taken while he was under the influence of the medication he took for his epilepsy. The reviewing court summarily rejected the claim.

These cases lend support for this court's finding that the voluntariness of defendant's admissions was unaffected by the fact that he was an epileptic. Moore presented no evidence to show the severity of his condition or the effect that a deprivation of medication might have on his behavior.

The next issue is whether Moore was denied a fair trial due to his counsel's conflict of interest stemming from the joint representation of Moore and codefendant Wiley. The State argues that this issue is waived because Moore

failed to object at trial to his privately-retained counsel's joint representation of him and Wiley and because trial counsel did not indicate in the post-trial motion that his ability to represent Moore was impaired by the joint representation of Wiley.

Our supreme court has repeatedly held that, absent plain error, waiver will apply and appellate review will be denied where the alleged errors were neither objected to at trial nor raised in a post-trial motion. (People v. Pasch (1992), 152 Ill.2d 133, 178 Ill.Dec. 38, 604 N.E.2d 294.) Furthermore, courts have held that unless the potential for a conflict of interest based upon multiple representation is brought to the attention of the trial court, the trial court may assume that the multiple

representation of defendants entails no conflict and that defendants have knowingly waived any risk of conflict. (Cuyler v. Sullivan (1980), 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708.) Absent an objection to the joint representation, defendant must demonstrate an actual conflict which adversely affected his counsel's performance. Cuyler v. Sullivan, 446 U.S. at 348, 64 L.Ed.2d at 346-47, 100 S.Ct. at 1718.

Moore apparently concedes that no objection was made at trial since he claims on appeal that the matter is reviewable because the record evidences an actual conflict of interest. However, Moore does not demonstrate an actual conflict of interest. Moore merely contends that trial counsel was hindered from "effectively utilizing" a

minor discrepancy in Wiley's oral statement to Moore's advantage. However, trial counsel did bring the discrepancy in the statements to the attention of the jury and, furthermore, as stated earlier, Wiley testified at trial and denied making the statements altogether. Wiley's and Moore's defenses were not conflicting. Rather, Wiley's testimony was consistent with Moore's defense that their statements were the fabrication of the police. In addition, Moore presents no plausible alternative defense strategy that might have been employed by separate counsel. Thus, we conclude that any conflict of interest is, at best, hypothetical and speculative and reversal of Moore's conviction is not required. See People v. Jones (1988), 121 Ill.2d 21, 117 Ill.Dec. 164, 520 N.E.2d 325; People v.

Vriner (1978), 74 Ill.2d 329, 24 Ill.Dec. 530, 385 N.E.2d 671.

The fourth issue is whether Moore was denied due process because the trial court refused to allow two proffered defense witnesses (the Hamptons) to testify concerning the alleged abusive treatment they received at the hands of unidentified police officers while they were held in custody and interrogated in conjunction with the Kelly investigation. In an offer of proof, defendants informed the court that the Hamptons were prepared to testify that they were beaten and coerced into making statements by the police. As Moore acknowledges, this issue was raised by Edwards, Wiley and Oliver in their consolidated appeals and this court rejected the assertion of error in a Rule 23 opinion, finding that the

proffered testimony of these witnesses was immaterial and irrelevant. We stand by our earlier ruling as set forth in that Rule 23 opinion.

A trial court may exclude evidence it finds to be immaterial and irrelevant. Absent a clear showing of abuse of discretion, the trial court's ruling on the admission of testimony will not be overturned. (People v. Williams (1990), 196 Ill.App.3d 851, 144 Ill.Dec. 1, 554 N.E.2d 1040.) We find no direct correlation between the coercive tactics allegedly experienced by the Hamptons and Moore's case. Therefore, we find no abuse of discretion in the exclusion of these witnesses. As an aside we note that despite the Hamptons' alleged beatings and coercion, the Hamptons did not confess to the crime. Therefore,

Moore's contention that the Hamptons' testimony of coercion would tend to show that he was beaten and coerced into confessing is inherently faulty.

Finally, Moore contends that the extended term sentence he received was improper and excessive. Initially, we note that defendant was found to be eligible for the death penalty, but that the court found sufficient mitigating factors to preclude its imposition. Defendant was then sentenced to the maximum extended term of 80 years' imprisonment, based upon the trial court's finding that the murder had been accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty and that defendant must be kept from society for its protection.

Although this court agrees that we live in an era of increased crime rates

and correspondingly increased sentences, we have found that the increased sentences do nothing to deter crime or make a better society. Nor do they alleviate the serious problem of overcrowding in our jails. The only thing that a lengthy jail sentence accomplishes is a false sense of security for the rich and feeling of despair and insecurity for the poor.

Nevertheless, it is not this court's function to impose its own sense of crime and punishment. Rather, the imposition of a sentence is a decision peculiarly within the province of the trial judge, who had the opportunity to hear the evidence as well as the factors in mitigation and aggravation. (People v. Barfield (1989), 187 Ill.App.3d 190, 135 Ill.Dec. 244, 543 N.E.2d 812.) We find no abuse of the broad discretion

given to trial courts when imposing sentences.

In this case four young men planned to rob an elderly man with a pacemaker who was known to run a concession business out of his home for the convenience of the neighborhood children. The four young men went to the man's house, induced him to open his door under the guise of wanting to purchase a snack and repaid his kindness by aiming guns at him and announcing a holdup. When the elderly man attempted to defend himself the four young men did not run away. Instead, one of them wrestled with the man to get his gun away from him and, while the man was so engaged, Moore entered the home and fired shots at the man. Under these circumstances, the trial court acted within its power when it imposed an

extended term sentence on Moore based upon the cold and brutal disregard Moore exhibited for Kelly's life.

For all the reasons stated above, we affirm Moore's convictions and sentence.

AFFIRMED.

GORDON, P.J., and McNULTY, J., concur.

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ILLINOIS SUPREME COURT
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October 6, 1993

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No. 75400 - People State of Illinois, respondent, v. Carlos Moore, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1993.